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IN THE
Supreme Court of the United States

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

On Exceptions to Report of Special Master on Motions for Summary Judgment

MOTION FOR LEAVE TO FILE SUR-REPLY AND SUR-REPLY BRIEF FOR PLAINTIFF STATE OF ALASKA

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MOTION OF PLAINTIFF STATE OF ALASKA FOR LEAVE TO FILE SUR-REPLY BRIEF

Pursuant to S. Ct. Rule 21, plaintiff State of Alaska respectfully moves for leave to file the accompanying Sur-Reply Brief. Although denominated a sur-reply, the brief is in the nature of an initial reply brief that responds, for the first time, to the arguments of the United States and its amicus curiae submitted in opposition to Alaska's exceptions to the Report of the Special Master. For the following reasons, there is good cause to allow the brief given the particular circumstances and importance of this original action.

BACKGROUND

The background to this case is set forth more fully in Alaska's Exceptions to the Report of the Special Master and the accompanying brief, which were filed on July 12, 2004. This is an original action between Alaska and the United States seeking to confirm Alaska's title to submerged lands underlying much of Southeast Alaska. As the Special Master

has noted, the case is "one of the largest quiet title actions ever litigated." Report at 2. The case is presently before the Court on Alaska's exceptions to the 294-page Report of the Special Master on motions for summary judgment. That Report recommends that the Court take dispositive action on every count of the Amended Complaint. As Alaska has noted without dispute, this Court must consider every issue in this original action *de novo* without any deference to the Master. *See* Alaska Br. 9.

Only Alaska filed exceptions to the Report, in a document that is essentially similar to a petitioner's merits brief in a case within the Court's appellate jurisdiction. Alaska filed exceptions to the Master's recommendations on every count not already conceded by the United States, and requests that the Court enter final judgment in its favor on the merits. The United States filed a 50-page responsive brief that is essentially similar to a respondent's merits brief in an appellate case, and requests that the Court enter final judgment in its favor on the merits. In addition, the United States was supported by a 30-page brief filed by an amicus curiae that participated in none of the proceedings before the Special Master.

Alaska's proposed responsive brief, submitted herewith, is therefore in the nature of a reply brief in an appellate case. It responds directly to the arguments of the United States and its amicus, and represents Alaska's first opportunity before this Court to respond to any arguments raised against the State. It also otherwise complies with the page limits and other filing requirements for merits reply briefs.

ARGUMENT

Although the Court's rules for original actions do not provide for the automatic filing of a responsive brief by a party raising exceptions, the Court has granted leave to file such briefs in the past. *See, e.g.*, *Kansas* v. *Colorado*, 124 S. Ct. 2433 (2004); *Kansas* v. *Colorado*, 531 U.S. 1122 (2001); *Texas* v. *New Mexico*, 485 U.S. 388, 388 (1988); *Arizona* v. *California*, 459 U.S. 811 (1982). And in a previous original

action between these same parties, the Court entered a stipulated order permitting the parties to file sur-reply briefs in support of their exceptions. *See United States* v. *Alaska*, 517 U.S. 1207 (1996).

For many reasons, it would likewise be appropriate to permit Alaska a responsive brief in this case: the important issues before the Court are most likely dispositive of the entire case one way or the other; the issues require the Court's *de novo* review and involve a large record; Alaska will otherwise have no opportunity to respond at all to the United States since the United States did not file exceptions of its own; Alaska's brief responds in part to new arguments made by an amicus that has never before appeared in this case; and the proposed brief is consistent with reply briefs filed by petitioners in cases within the Court's appellate jurisdiction.

1. Some issues that come before the Court on exceptions to Masters' reports in original actions are interlocutory matters that are relatively straightforward and that may not require further responsive briefing. By contrast, the issues now before the Court will most likely be dispositive on the merits of this entire case, which has been pending for nearly five years. The Master recommended granting judgment as a matter of law on every count not already conceded by the United States, and based on the parties' opening briefs it appears likely that this Court will rule one way or the other on each count as a matter of law. The issues are very important, as they relate to the asserted dominion of the State of Alaska over lands that are "an inseparable attribute" of its state sovereignty. *United States* v. *Louisiana*, 363 U.S. 1, 16 (1960). Many of the issues are also complex, as evidenced by the fact that the Master saw fit to issue a 294-page report.

In these circumstances, the Court's determination of this case would benefit greatly from consideration of Alaska's responses to the lengthy submissions of the United States and its amicus. As explained in the accompanying brief, Alaska believes that the United States, among other things, has

mischaracterized certain arguments made by Alaska in its opening brief, has advanced new arguments in opposition not addressed in Alaska's exceptions or the Master's report, and has made arguments inconsistent with the Report it seeks to defend. Moreover, even though the United States did not file formal exceptions—to which Alaska would have been entitled to respond as of right—the United States nevertheless asserts that the Master erred on a number of issues. *See, e.g.*, U.S. Br. 14 n.7 ("The United States disagrees with the Master's characterization * * *."); *id.* at 24 n.12 ("The United States believes that the Master erred * * *."); *id.* at 28 n.17 (United States "disagrees with [the Master's] methodology"); *id.* at 40 & n.29. Because the United States filed no exceptions, without a sur-reply Alaska would have no opportunity to respond to these claims of error.

Accordingly, considerations of simple fairness militate overwhelmingly in favor of permitting Alaska an opportunity to reply to the United States' arguments, as would any petitioner in an appellate case. The Court should not consider the United States' arguments in favor of depriving Alaska of part of her sovereignty without also considering the State's response to those arguments.

2. In some original actions, both parties file exceptions to reports of Special Masters, which ensures that each party will have at least some opportunity to respond to arguments raised by the other party. Here, however, only Alaska has filed formal exceptions; thus, if Alaska cannot file a further reply it will have no opportunity to correct what it considers to be numerous errors in the United States' brief. As noted, Alaska believes that many of the arguments presented by the United States go beyond what is set forth in the Master's report and in Alaska's exceptions, and some of those arguments even challenge recommendations of the Master. In addition, unlike some other proceedings on exceptions in original actions, where the Court may already be familiar with issues as a result of earlier proceedings, the present

proceedings represent the first—and probably only—opportunity for the Court to consider the important substantive issues in this case. Given that Alaska has had no opportunity before the full Court to respond to any arguments against it, given the importance of the case, and given the dispositive nature of the proceedings, Alaska believes it should be heard in response to those arguments.

3. In cases within the Court's appellate jurisdiction, the petitioner has the right to file a reply brief in response to the respondent's arguments. Alaska submits that there is even more reason to follow that procedure here. For unlike the typical appellate case that comes before the Court, in which the issues have been refined through two levels of judicial decisionmaking, the Court must consider the issues in this case *de novo*. In making his recommendations, the Special Master permitted the parties to file opening, responsive, and reply briefs on each motion for summary judgment—for a total of 18 briefs—and he considered all of those briefs in connection with more than 560 documentary exhibits. Alaska believes that the Court, exercising its plenary review, should employ a similar procedure to that used by the Special Master, in order to ensure that each party has an opportunity to respond fully to the points raised by the other. That is particularly true given the likelihood, based on prior practice, that the Court will hold oral argument in this case. A response from Alaska would assist the Court by allowing it to focus the oral argument on points not fully clarified by the briefs, rather than using scarce argument time to examine points best addressed in Alaska's sur-reply.

4. A responsive brief is further warranted in light of the participation, for the first time in this case, of an amicus curiae in support of the United States. In addition to the 50-page brief filed by the United States, amicus National Parks Conservation Association ("NCPA") has filed its own 30-page brief in opposition to Alaska's exceptions. NCPA has never before appeared at any stage of this case, either

before the Special Master or this Court. And it has now sought (improperly, in Alaska's view) to raise new arguments not addressed by the United States, by the Special Master, or in Alaska's exceptions. Indeed, virtually its entire brief consists of such arguments. *See* Amicus Br. 13-30. Under the Court's rules, amicus briefs on the merits are to be filed at the same time as the brief of the party being supported or, if the amicus supports neither party, at the same time as the petitioner's brief. *See* S. Ct. R. 37.3(a). The rule thus contemplates that the opposing party will always have an opportunity to respond to the arguments of the amicus. If the amicus supports the petitioner, the respondent can respond in its responsive brief. If, similar to this case, the amicus supports the respondent, the petitioner can respond in its reply brief. Good cause therefore exists to permit Alaska to file a sur-reply brief in this case, for otherwise Alaska will have no opportunity to respond to numerous new arguments raised for the first time by a party that has never before appeared at any stage of this litigation.

5. Finally, Alaska's responsive brief conforms with the page limit governing reply briefs in cases within the Court's appellate jurisdiction, and has been filed within the time period allowed for such reply briefs. Including this brief, Alaska will have filed briefs totaling seventy pages, the normal amount for a party challenging a decision before this Court, while the United States and its amicus have filed briefs totaling eighty pages. Accordingly, the United States cannot claim to have been prejudiced by the filing of the brief.

CONCLUSION

For the foregoing reasons, the Court should grant Alaska leave to file the accompanying sur-reply brief.

Respectfully submitted,

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SUR-REPLY BRIEF FOR STATE OF ALASKA

I. THE STATE HAS TITLE TO THE SUBMERGED LANDS UNDERLYING GLACIER BAY.

A. The Plain Language Of Section 6(e) Is Dispositive.

1. The United States does not dispute the standard for Count IV: the Court cannot infer Congress's intent to retain submerged lands—an inseparable attribute of state sovereignty—but instead will presume the opposite unless Congress *clearly* stated an intent to retain title at statehood. Yet the United States' argument does not embrace this standard in the least. It identifies only the proviso of Section 6(e) of the Statehood Act as the purported expression of Congress's intent to retain title, yet nothing in the statute's plain language remotely covers the submerged lands of Glacier Bay, much less provides the requisite *clear and unambiguous* expression of intent. And although Alaska highlighted this issue as the core of its title claim, the United States buries its response starting on page 44 of its brief. When it does finally address the point, it posits an untenable reading of Section 6(e).

Ignoring the plain statutory language, the United States argues generally that provisos do not always make exceptions. U.S. Br. 45. But there is no mystery about how the Section 6(e) proviso works: it expressly defines itself as an exception to a particular action, unlike the statutes in any of the cases the United States cites. By its terms, the proviso refers back to the main clause and retains for the United States a *subset* of the properties covered by the main clause: "Provided, that *such transfer shall not include* * * *." The United States has no explanation for this clear text; nowhere in its brief does it attempt to explain the key words "such transfer shall not include." Indeed, when it finally addresses the point on page 49, the United States *admits* that "Congress provided that the 'transfer' identified in the main clause *excluded* lands set aside 'for the protection of wildlife * * *.' " U.S. Br. 49 (emphasis added). It says, however, that Congress did not

mean that wildlife refuges would be an *exception* to the conveyance but rather was just making "abundantly clear" that such refuges were not to be conveyed to the state. *Id.*

But the statute does not say that. Indeed, the United States never explains why the proviso would retain lands not otherwise conveyed. And with good reason: under its irrational interpretation, the proviso's *sole purpose* is to retain submerged lands even though the text says nothing about such lands. This is evident from the interaction between Section 6(e) and the rest of the Statehood Act. The United States says that the proviso is wholly divorced from the main clause, such that *none* of the lands covered by the proviso would otherwise be transferred to the State under the main clause. *See* U.S. Br. 48. But under Section 5, the United States *already* retained title to all lands it owned before statehood, except as provided in Section 6. Section 6(m) expressly grants the State submerged lands, but does not affect uplands of any properties the United States retained under Section 5. Under the U.S. interpretation, then, since Congress already retained *upland* federal property under Section 5, the sole purpose of the Section 6(e) proviso is to retain submerged lands within the described federal reservations.

The interpretation is untenable. Excluding property from a conveyance if the property was not included in the first place makes no sense; such an interpretation would render the proviso pointless and should be rejected. *See, e.g., Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 113 (2001) (rejecting interpretation that would render exclusion superfluous). And *nothing* in the proviso's plain language suggests that it was meant only to retain submerged lands. It refers broadly to entire reservations, nowhere mentions submerged lands, and is in the middle of a large subsection of the Act that deals only with transferring jurisdiction from the Fish and Wildlife Service to the State. If Congress intended the proviso to retain submerged lands in Glacier Bay, it could hardly have accomplished that goal in a more obscure manner.

In fact, Congress intended no such thing. It unambiguously intended the proviso to retain wildlife refuges otherwise encompassed by the main clause—which indisputably does not include Glacier Bay—to prevent their transfer to the State under the main clause. Having no support in the statute—much less the unequivocal statement required to divest the State of its equal footing lands—the United States asks the Court to disregard the clear statement rule and legislate its preferred result. The Court should decline the invitation.

2. The United States argues that *no* wildlife refuges covered by the proviso would otherwise have fallen within Section 6(e)'s main clause. U.S. Br. 48. That is wrong.[1] Alaska has cited the Kodiak Wildlife Refuge and Kenai Moose Range—which together constituted about half the acreage of all FWS refuges in Alaska—as two properties otherwise covered by the main clause but excepted by the proviso. The United States responds, somewhat disingenuously, that these reservations would not fall within the main clause because they were created under the provisions of the Alaska Game Law of 1925, not the Alaska Game Law of 1943. *Id.* at 48 n.38. These are the *same law*, however—the general wildlife management law for Alaska. The 1943 law is simply an updated version of the 1925 law, revised after these two reservations were created in 1941. *See* Act of July 1, 1943, ch. 183, 57 Stat. 301 (restating and amending 1925 law). The 1925 law was also codified at 48 U.S.C. § 192 (1940), the precise code section identified in Section 6(e).[2]

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[1] The argument, however, is ultimately immaterial, because this case is about Glacier Bay and, whatever else the main clause may cover, the parties agree that it does not cover Glacier Bay

[2] The United States also wrongly asserts that the main clause excludes lands upon which public activities took place. U.S. Br. 48 n.38. The conveyance ensured a smooth transfer of fish and wildlife management to the new State government. It assured that the State would get only the property that *the United States government* had used solely for general local fish and wildlife

3. Having nothing to say about the text of Section 6(e), the United States resorts to knocking down a strawman argument of its own creation. It characterizes the State as having made a separate argument that the proviso applies only to lands both set apart for wildlife and administered by FWS. U.S. Br. 38-39. In reality, Alaska noted the different jurisdiction of FWS and NPS not as a separate argument, but merely as additional support showing that Congress intended the proviso as an exception to the main clause. *See* Alaska Br. 14-17. The United States does *not* dispute the central points of this analysis: that the main clause includes only FWS property, because FWS administered the cited laws, *see id.* at 15 n.6, and that the main clause does not cover Glacier Bay, an NPS property, *see* Report at 267.

4. The United States argues that the plain language of Section 6(e) is "counter-intuitive" and "illogical" because it did not retain submerged lands within a national monument. U.S. Br. 48. But there is nothing incongruous about how Congress treated NPS lands in Alaska. Submerged lands within national monuments and parks are overwhelmingly state owned. Forty-five states had entered the Union by the time of the 1906 Antiquities Act, and 48 had entered by the time of the 1916 national parks Organic Act and the 1953 Submerged Lands Act ("SLA"). Therefore, any federal monuments or parks in these states necessarily contain state-owned submerged lands that had passed to the states at their creation. For example, California owns vast amounts of submerged lands within the offshore California Coastal National Monument, which extends twelve miles from the shoreline for the entire length of the California coast. *See* 65 Fed. Reg. 2821 (2000). *See also United States* v. *California*, 436 U.S.

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management, with the United States retaining property that it would need, even in part, for its continued management of fish and wildlife that was migratory or governed by treaty. Limited *public* uses (such as recreation) were permitted in wildlife refuges, but such uses had no relevance to the *governmental* division of fish and wildlife management accomplished by Section 6(e).

32, 37 (1978) (SLA granted California all submerged lands within the Channel Islands National Monument).[3]

B. Legislative History Refutes The U.S. Interpretation.

Without disputing that legislative history cannot satisfy the clear statement rule, *see* Alaska Br. 14, the United States nevertheless relies on such sources. The material it cites, however, does not come close to satisfying its burden.

Virtually ignoring the statement in the Senate report that, under the proviso, wildlife refuges are "[s]pecifically excepted from the grant" in the main clause, S. Rep. No. 83-1028 at 31 (1954), the United States relies principally not on any congressional report or legislator's statement, but on comments of an agency official, Secretary Chapman. That would be an exceedingly slim reed in any case. *See, e.g.*, *Kelly* v. *Robinson*, 479 U.S. 36, 51 n.13 (1986) ("[N]one of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports. We decline to accord any significance to these statements."). In this case, though, the comments are truly meaningless, for the United must point to a *clear* statement by *Congress* ratifying the purported reservation. That requirement cannot be satisfied through reliance on ambiguous snippets of correspondence from an Executive branch official that nowhere refer to Glacier Bay, much less its submerged lands.[4]

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[3] While Congress did not treat Alaska's national monuments differently than those in other states, it *did* give special status to Alaska's only national park at the time, Mount McKinley, granting exclusive federal jurisdiction in Section 11(a) of the Statehood Act.

[4] The United States also cites a Senator's comment at a hearing that "[w]e are not too much interested in which division of the Department of the Interior does the work." U.S. Br. 43 n.33 (citation omitted). This statement had nothing to do with the proviso or Glacier Bay. The Senator was making a different point, apparent from the larger context—that he thought a two-million acre reserve to maximize food for moose was excessive.

Regardless, Chapman stated only that an amendment to Section 6(e) would create "a division of the fish and wildlife activities now conducted by the United States in Alaska, along lines of demarcation conforming to the recognized distinctions between Federal and State functions." U.S. Br. 47 n.37 (citation omitted). He distinguished between the property the State would need for its new "fish and wildlife activities" and the property the United States would need for its continuing federal "fish and wildlife activities." The amendment accomplished this division by giving the State only property that could be used for local fish and wildlife management under the general management laws, whereas the pre-amendment provision would have given the state *all* FWS property in Alaska. *See* Ex. US-IV-40 at 7. Because some FWS wildlife refuges were created under one of the general management laws, the Alaska Game Law, Chapman proposed a proviso excepting them from the conveyance. Glacier Bay had nothing to do with this division of property.[5]

C. The Court Did Not Decide The Issue In *Alaska*.

The United States argues that the Court has already decided in *United States* v. *Alaska*, 521 U.S. 1 (1997), that the Section 6(e) proviso retains submerged lands in all reservations set aside for the protection of wildlife, regardless of whether they otherwise would fall within the main transfer clause. That is false. The Court in *Alaska* expressly assumed that the proviso was *not* independent of the main clause—a point the Master acknowledged but the United States never mentions.

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5 The United States argues that when Chapman mentioned lands set aside "pursuant to the fur seal and sea otter laws, the migratory bird laws or other statutes of general application," he must have been referring to the Antiquities Act even though he never cited it. U.S. Br. 42 n.31 (citation omitted). Given the statement's context—a discussion of retaining FWS jurisdiction—and given that the largest refuges were created under the Alaska Game Law rather than the more specific laws he cited, it is far more plausible that the laws "of general application" were the generally applicable local fish and wildlife management laws later cited in Section 6(e).

In *Alaska*, the State argued that because the wildlife refuges covered by the proviso were exempted from the main clause, the submerged lands were not retained by the United States but instead passed to the State under Section 6(m). The Court did not, as the United States claims, reject this argument by holding that the proviso is a retention clause independent of the section's main conveyance clause. Rather, the Court expressly assumed that the ANWR lands would otherwise pass to Alaska under the main clause and thus that the proviso is *not* independent of the main clause. *See Alaska*, 521 U.S. at 60-61 (unless ANWR lands were covered by the proviso "they would have passed to Alaska under the main clause of § 6(e)"). Thus, while the proviso is a retention clause, it expressly retains only a subset of the lands otherwise covered by the main clause. The United States ignores the express premise for the Court's holding in *Alaska*.[6]

D. Glacier Bay Is Not A Wildlife Refuge.

Solely in the alternative, Alaska has argued that Congress did not set Glacier Bay apart for the protection of wildlife within the meaning of the proviso. *See* Alaska Br. 19-21. When the United States finally gets around to responding on Count IV, it attempts to confuse the issue by responding first to this alternative argument. U.S. Br. 39-40. The Court need not even consider the argument, however, because the

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6 The United States questions whether the assumption was correct. *See* U.S. Br. 46 n.36. The parties agree, however, that that question is immaterial to this case. *See id.* at 46 (question "is of little moment"); Alaska Br. 18 n.7. This case is about Glacier Bay, and it is *undisputed* that Glacier Bay is *not* covered by the main clause. But although the Court in *Alaska* did not explain the basis for its assumption that ANWR fell within the main clause, the Court did hold that the proviso covered ANWR because it had been set apart for a possible future wildlife refuge. Thus, the Court apparently assumed that the possibility that the ANWR lands would be used for the purposes specified in the main clause was sufficient to deem them covered by that clause but for the proviso.

proviso clearly does not apply to lands, such as Glacier Bay, not otherwise encompassed by the main transfer clause.[7]

But the United States is incorrect as well. It contends that the Antiquities Act now permits monuments for the protection of wildlife even though some monuments have no wildlife. But the question here is whether Congress unambiguously intended *Glacier Bay* to be a reservation for the protection of wildlife, not whether the Executive could now in some other circumstances create monuments for that purpose. Neither the Glacier Bay reservation order nor the letter forwarding it to the President mentioned bear or any wildlife conservation as a purpose. Alaska Br. 21 & n.11. The clear statement rule is therefore not satisfied.[8]

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[7] The Court also need not consider whether the Executive reservation included submerged lands, another issue onto which the United States seeks to deflect attention. But the evidence does not show an *unambiguous* Executive intent to reserve submerged lands. Merely drawing boundaries through marine waters does not evidence a clear intent to include submerged lands. Federal agencies routinely created upland reservations in Alaska by drawing large boxes around areas that included water: the boundaries of the Tongass Forest were drawn that way, yet the Forest Service continually disclaimed authority over the marine areas for half a century. *See* Mem. in Supp. of AK Mot. for Summ. Judg. on Count III at 28-35. It is not clear that *title* to submerged lands was necessary to study pre-glacial stumps or flora and fauna that appear as glaciers recede, or the glaciers themselves. *See* Report at 245-255. And it is not clear that protecting wildlife was even a purpose of the Monument. *See* Report at 255-263; Alaska Br. 21 & n.12.

[8] The United States "suggests" that the issue is affected by an allegation in the complaint that bear preservation was a purpose of expanding the Monument. U.S. Br. 40 & n.29. The Master found that Alaska did not judicially admit that legal issue, Report at 256, the United States took no exceptions, and the question is thus not before the Court. In any event, a reservation's purpose is a *legal* question that cannot be resolved by allegations in the complaint. *See, e.g., Guidry* v. *Sheet Metal Workers Int'l Ass'n*, 10 F.3d 700, 716 (10th Cir. 1993). And the fact that some people associated with the Monument's creation may have had bear preservation in mind cannot constitute the requisite clear statement of Congress.

E. The New Amicus Arguments Should Be Rejected.

1. The Court cannot consider the arguments of the amicus that the United States has never raised. The Court will not consider arguments of amici that were not raised by the parties in the proceedings below or in this Court. *See Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992); *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981). The rule should apply with even more force here, since the Master expressly contemplated amicus participation below, *see* Feb. 12, 2001 Order, § 5, and Alaska's exceptions were based on the arguments raised and ruled on below.

2. But the arguments are also wrong. The amicus argues that the 1906 Antiquities Act and 1916 Organic Act suffice to defeat state title to submerged lands in the later-created Glacier Bay Monument, without any further action by Congress at statehood. But this Court requires a clear showing *both* that Congress intended to defeat state title to specific pre-statehood reservations of submerged lands, and that the Executive intended to reserve the lands. *See* Alaska Br. 10; U.S. Br. 31. *All* executive action must be authorized by Congress. *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-214 (1976). Thus, if general authorizing statutes could defeat state title to unnamed lands in advance, the separate requirement of ratifying action by Congress would be meaningless.

The Court squarely rejected this argument in *United States* v. *California*, 436 U.S. 32, 37 (1978). There, the President had reserved submerged lands within a national monument in 1949, after the Court ruled in *United States* v. *California*, 332 U.S. 19 (1947), that the lands had not passed to California at statehood. Congress then enacted the SLA in 1953. The Court held that the SLA granted to California the submerged lands within the monument, even though the President had reserved them under the Antiquities Act. 436 U.S. at 37. As

the Court stated, "[a] reservation under the Antiquities Act * * * means no more than that the land is shifted from one federal use, and perhaps from one federal managing agency, to another," and "cannot operate to escalate the underlying claim of the United States to the land in question." *Id.* at 40-41. Thus, *California* holds that an Executive reservation of submerged lands under the Antiquities Act does *not* suffice to retain those lands for the United States.

For Alaska, Congress expressly incorporated the SLA in Section 6(m) of the Statehood Act. Accordingly, any expression of Congressional intent to retain submerged lands within a particular national monument in Alaska would have to have been in the Statehood Act. The United States identifies only Section 6(e) as providing the ratification, but that statute is patently insufficient as shown above.[9]

3. The amicus implies that states in general, and Alaska in particular, are not fit to own submerged lands within national monuments or parks. *See, e.g.*, Br. 23. This argument demeans all states, which have for centuries exercised responsible stewardship over navigable waters within their boundaries as "an inseparable attribute" of their sovereignty. *United States* v. *Louisiana*, 363 U.S. 1, 16 (1960). And this sovereignty, as noted, overwhelmingly includes submerged lands within parks and monuments, nearly all of which were created after their respective states. *See supra* at 4-5.[10]

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9 The amicus asserts that Congress had notice of a map showing the Monument boundaries. *See* Amicus Br. 18-19. But without some *action* by Congress showing a clear intent to defeat state title, such notice is immaterial. Indeed, the same map showed the boundaries of the Tongass National Forest as encompassing marine waters, but the United States has *conceded* that Congress did not express an intent to defeat state title to those lands. *See* U.S. Mem. in Response to Mot. for Summ. Judg. on Count III.

10 The amicus suggests that this case could impact the status of the Colorado River in the Grand Canyon because the Grand Canyon National Monument was created before Arizona statehood. Br. 15. But Section 6(e) of the *Alaska* Statehood Act has no bearing on the Colorado River. If title to lands underlying that river is ever disputed—and the amicus admits it is not—that issue would be governed by the navigability of the river at statehood and the reservations and legislation applicable to that specific area.

Moreover, the Federal government has substantial authority, under the Commerce Clause and other provisions, to regulate submerged lands it does not own. *See, e.g.*, 43 U.S.C. § 1314(a) (reserved federal rights under SLA); *United States* v. *Brown*, 552 F.2d 817, 821 (8th Cir. 1977) (Property Clause allowed Congress to prohibit hunting on state-owned waters within national park). Thus, there is no contention here that state title would prevent Congress from regulating interstate cruise ships, commercial fishing or endangered species in Glacier Bay. In fact, Congress has done all those things. *See, e.g.*, 16 U.S.C. § 1538(a)(1)(B) (Endangered Species Act applies regardless of land ownership); Pub. L. No. 105-277, § 123, 112 Stat. 2681-259 (1998) (phase-out of commercial fishing in Glacier Bay), Pub. L. No. 107-63, § 130, 115 Stat. 414, 442 (2001) (regulating cruise ship traffic in Glacier Bay). Under the Supremacy Clause, state authority yields to any valid exercise of federal power. That the state and federal governments would have concurrent jurisdiction over sovereign state lands is a fully anticipated part of our federal system, not the aberration the amicus suggests.

Finally, the statements that Alaska wants to drill for oil, build "floating lodges," or authorize "mariculture" in Glacier Bay (Br. 27-28) are pure nonsense. The State has absolutely no intention of doing any such things. And state laws and plans offer a means of preventing development, including mining or lodges, that is incompatible with the waters or adjacent lands. *See* Alaska Stat. § 38.05.185(a); Northern Southeast Area Plan at 22, 35 (2002) (www.dnr.state.ak.us/mlw/planning/areaplans/nseap). Alaska takes seriously its responsibility to preserve the natural environment of the navigable waters that are its sovereign birthright. The

contrary accusations of the amicus are not only without foundation but also demean our Nation's federal structure.

For all these reasons, the Court should grant judgment to Alaska on Count IV of the Amended Complaint.[11]

II. THE WATERS OF THE ARCHIPELAGO ARE HISTORIC INLAND WATERS.

The United States nowhere shows that it ever took the bizarre position, before statehood or even a decade after, that there were isolated enclaves of high seas within the Archipelago wholly surrounded by territorial waters. Nor does it refute Alaska's evidence to the contrary.

1. The United States wrongly asserts that Alaska "acknowledges" that the Master required it to "show that the United States *exercised* the power to exclude all foreign vessels from the area." U.S. Br. 6 (emphasis added). In fact, the Master opined that Alaska "correctly argues that the United States *does not actually have to exclude foreign vessels* from waters for those waters to constitute inland waters; instead, the United States *merely has to assert the right to exclude them*." Report at 128 (emphasis added). The United States routinely allows foreign vessels into its historic

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[11] The Master recognized Alaska's motion for summary judgment on Count IV, which Alaska has renewed in its exceptions. While noting that the Master made no formal recommendation on the motion, U.S. Br. 36 n.27, the United States provides no reason why this Court cannot now grant judgment to Alaska if the Court holds that Congress did not ratify the purported reservation. Neither party has identified disputed factual issues. It thus would serve no purpose for the Court to remand the case to the Master in these circumstances. Indeed, even if Alaska had not made a motion, judgment would still be proper. *See, e.g.*, *DeWitt Constr., Inc.* v. *Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1135 n.6 (2002); *Bird* v. *Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1152 (9th Cir. 2001); 10A Charles A. Wright, Arthur Miller & Mary K. Kane, *Federal Practice and Procedure* § 2720, at 345 (1998).

and other inland waters—for example, Chesapeake Bay—without relinquishing its claim to the waters.

2. The United States does not answer Alaska's contention (Br. 22-24) that the 1903 Arbitration necessarily put foreign nations on notice of the U.S. claim to the Archipelago given this Court's holdings in the *Alabama & Mississippi Boundary Case*, 470 U.S. 93, 106-109 (1985).[12] Indeed, the United States nowhere even *cites* that decision, much less acknowledges the Court's holding that Norway and Britain's reliance on the U.S. claim left "*no doubt* that foreign nations were aware that the United States had adopted this policy." *Id.* at 107 (emphasis added). Instead, the United States wrongly asserts that it "had made clear to Norway *in 1949* that the United States did *not* claim the Archipelago waters as inland." U.S. Br. 15 n.8 (emphasis in original). The cited 1949 letter, however, *nowhere mentions the Archipelago*. *See* Report at 84-85; Report of the Special Master at 78-79, *United States* v. *Alaska*, No. 84 Orig. (Mar. 1996). Thus, it is not surprising that both Norway and Britain continued to rely on the U.S. claim less than one year *after* that letter. *See* Ex. AK-82 at 162-163, 200, 219; Ex. AK-83 at 154-155.[13]

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[12] The United States "disagrees" with the Master's finding that the United States expressed a position on the status of the waters in the Alaska Boundary Arbitration. U.S. Br. 14 n.7. The United States took no exceptions, however, so its objection is waived. In any event, this Court has already held that the Arbitration statements represented the "publicly stated policy of the United States." *Alabama & Mississippi Boundary Case*, 470 U.S. at 106-107. Those statements were not merely hypothetical musings. Although the United States was arguing against Britain's use of international law principles to delineate the *physical* coastline then in dispute, it unequivocally stated that those principles established the *political* boundaries of the Archipelago. *See* Report at 56-57.

[13] Indeed, the letter references a U.S. proposal made at the 1930 Hague conference. In 1964, 15 years *after* the letter, the United

3. The United States wrongly contends that the *Marguerite*'s location is "unsettled." U.S. Br. 16. The *only* record evidence referencing an *actual* location puts the vessel squarely in one of the "pockets" the United States now says were high seas at the time. The Coast Guard's initial reference to a non-existent location was simply a mistake that later was definitively rectified. The reference does not create a dispute of fact, since there cannot be any contention that the ship was at a place that did not exist. Moreover, the letter attaching the map showing the location of the interception expressly stated that the ship had been "fishing in American waters," Alaska Br., App. 9a, thus confirming that the United States claimed the identified location as American waters.[14]

4. The United States does not refute Alaska's contention that *discriminatory* enforcement of fishing regulations shows a claim to the waters at issue. It quotes the Court's comment that fisheries jurisdiction "frequently differs in geographic extent from the boundaries claimed as inland or even territorial waters." *United States* v. *Alaska*, 422 U.S. 184, 198-199 (1975). But the comment was made in the Court's discussion of *nondiscriminatory* enforcement for conservation purposes, not discriminatory enforcement against foreign nationals in areas open to U.S. fishing. As the Court stated, the latter action "manifests an assertion of sovereignty to exclude foreign vessels altogether" and "must be viewed * * * as an exercise of authority over the waters in question as inland waters." *Id.* at 201, 202. At statehood, international law barred discriminatory fisheries enforcement against foreigners outside the territorial sea. *See* Convention on Fishing and Conservation of the Living Resources of the High Seas, *opened for signature*

States told this Court that the waters of the Archipelago would be *inland waters under that very proposal*. *See* Alaska Br. 24 & n.14.

[14] October 1925, the date of the map, is in a contemporary time period with the July 1924 seizure. But that point is immaterial. For the map, apparently prepared on information from the ship's captain, *see id.*, is *undisputed* evidence of the ship's location.

Apr. 29, 1958, art. 7.2(c), 17 U.S.T. 138, 142, T.I.A.S. 5969 (1966) (permitting extra-territorial enforcement only if "such measures do not discriminate in form or in fact against foreign fishermen") (treaty cited in *Alaska*, 422 U.S. at 199).[15]

The United States disingenuously asserts that the United Nations report cited as further support for this rule, *see* Alaska Br. 29, "merely indicates that a nation's continuous assertion of exclusive fishing rights might give rise to an historic fisheries claim, not a historic waters claim." U.S. Br. 18 n.11. The quoted passage, however, states quite explicitly that a nation's claim to waters based on exclusive fishing rights "would be a claim to the area *as its 'historic waters.'*" Ex. US-I-4 at 13-14 (emphasis added).

5. The United States asserts that the evidence of a Russian blockade of the Archipelago is simply Alaska's "speculation." U.S. Br. 11. But it was the United States' *own expert* who described the *Chichagoff*'s actions as "a Russian blockade" and noted that it had "forbidden" a vessel from traveling to Sitka "by way of the interior channels." Alaska Br. 30 (citations omitted). Given the "relatively relaxed interpretation of the evidence" that governs this inquiry, *Alabama & Mississippi Boundary Case*, 470 U.S. at 114—a standard the United States does not dispute—this testimony, along with

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[15] The current Exclusive Economic Zone ("EEZ"), which extends 200 miles offshore, has no relevance here. *Cf.* U.S. Br. 16 n.9. Fishing regulation in the EEZ dates only from *1976*, long after Alaska's title vested. *See* Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. No. 94-265, 90 Stat. 331 (1976). As noted, at statehood international law barred discriminatory extraterritorial fisheries enforcement. Thus, the *Marguerite* seizure and the regulations applied to foreign vessels in the Archipelago until 1971 were based on the 1906 Alien Fishing Act, which expressly covered only Alaskan territorial waters. *See* Alaska Br. 25-26. It was not until 1982 that international law endorsed the EEZ. *See* U.N. Convention on the Law of the Sea, Dec. 10, 1982, arts. 55-63, 21 I.L.M. 1245, 1280-82 (1982).

Alaska's other evidence, provides ample basis for concluding that the 1903 U.S. claim continued prior Russian practice.[16]

6. In any event, the United States wrongly asserts that a historic inland waters claim must be asserted continuously for a century. U.S. Br. 20. It does not dispute Alaska's showing that another historic bay was recognized after a much shorter time period than the 68 years between the 1903 Arbitration and the 1971 disclaimer (or even the 56 years between 1903 and statehood). *See* Alaska Br. 31 & n.19.[17]

7. The United States offers no support for its *ipse dixit* that recognizing these historic waters would "create a significant adverse international precedent restricting the freedom of the seas." U.S. Br. 21. In fact, that pronouncement is directly contrary to the considered position the United States took long ago. *See* Alaska Br. 36; Ex. AK-122 at 1.

III. THE WATERS COMPRISE JURIDICAL BAYS.

A. Assimilation Is Required Under *Maine*.

1. Rocky Pass. In opposing assimilation of Kuiu and Kupreanof islands, the United States states only that a " 'mere glance at a map of the region' reveals that the Master's position comports with reality and common sense." Br. 25 (quoting *United States* v. *Maine*, 469 U.S. 504, 514

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[16] The United States notes that the 1886 internal correspondence of Secretary Bayard was published 20 years later, in 1906. U.S. Br. 13. That publication, however, was *after* the United States had expressly claimed the Archipelago's waters as inland in 1903.

[17] The United States incorrectly describes the waters of the Archipelago as "an international route of travel." U.S. Br. 20. *See also id.* at 27. The Master's report (at 104-107) reveals that most foreign vessels—carrying explorers, fur traders, prospectors traveling to the Klondike through Skagway, and tourists—did *not* use the Archipelago as an international route of travel. Instead, they entered the Archipelago to visit it, much like the foreign vessels entering Mississippi Sound to reach Gulf ports. *Cf. Alabama & Mississippi Boundary Case*, 470 U.S. at 103.

(1985)). But while the United States quotes *Maine* for that proposition, that decision in fact compels the contrary result.

In holding that Long Island must be assimilated, the Court in *Maine* did *not* evaluate "the entire area across which the two land-forms of interest face one another"—the United States' proposed test here. U.S. Br. 25 (citation omitted). Rather, the Court evaluated only a select portion of those waters: the East River. The United States does not dispute that if the Court had used the United States' newly proposed test in *Maine*, Long Island would likely have failed that test. *See* Alaska Br. 43-44. Nor does it dispute that Rocky Pass is the area here that is analogous to the East River, or that it presents a *stronger* case for assimilation than was presented in *Maine*. *Id.* at 43. Under *Maine*, these undisputed points compel rejection of the United States' new position here.

The United States parrots the Master's view that the Court must employ a new, inflexible mathematical test here because any other approach "would inevitably generate controversies." U.S. Br. 25 n.13. But the Court did not employ such a test in *Maine*. And as even the United States recognizes, *Maine* sets forth a subjective, multi-factor test for assimilation. *Id.* at 24. The United States has identified no irreconcilable controversies engendered by the Court's common-sense approach in the nearly 20 years since *Maine*. As with any multi-factor test. there will be some cases that are more difficult to decide than others. But the United States has identified no reason for overruling the *Maine* approach in favor of its new, inflexible alternative.

2. Wrangell Narrows. The United States' *sole* objection to assimilation of Kupreanof and Mitkof islands is that Wrangell Narrows allegedly has too much navigational utility. *See* U.S. Br. 25-26. Again, the United States disregards the controlling decision in *Maine*. Because the East River has always been far more heavily trafficked than Wrangell Narrows—a fact the United States does not dispute—this factor cannot bar assimilation here. *See* Alaska Br. 40-41.

3. Dry Island. Alaska has not "forfeited" its argument that Dry Island is a part of the mainland. U.S. Br. 27. To the contrary, Alaska has expressly raised that argument. *See* Alaska Br. 44-45. The Master did not reach the issue, Report at 193, but the Court can and should find assimilation. As both the Master and the United States have acknowledged, the Court in *Maine* assimilated Manhattan based on its obvious connection to the mainland. *See id.* at 191 n.51; Tr. at 70 (Feb. 4, 2003) (statement of U.S. counsel that "the Harlem River * * * is another example of something that's so clear that one doesn't even ask the question. Manhattan through the Harlem River is part of the mainland."). The United States advances no reason why Dry Island, similarly separated by an actual river, should be treated any differently.[18]

B. The Claimed Bays Are Well-Marked Indentations.

In response to the argument that the claimed bays are well-marked indentations under Article 7, the United States argues only that "Alaska plainly demands too much of the mariner." U.S. Br. 29. That is no answer. This question has always been resolved by looking at a map of the claimed bay *without* reference to non-assimilated islands. *See* Alaska Br. 46 & n.29. The *actual* standard of Article 7 asks whether an area is a "well-marked indentation" rather than "a mere curvature of the coast." The United States nowhere counters Alaska's submission that North and South Bays are far too pronounced indentations to be mere curvatures of the coast. Instead, it relies on a term—"geographical obviousness"—that is in the Master's report but *not* in Article 7. *See* U.S. Br. 28.

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[18] The United States claims the Master "erred" by overlooking a NOAA chart of Dry Strait, U.S. Br. 24 n.12, but the Court should not consider that argument because the United States took no exceptions. In any event, the Master was aware of the chart's flaws. As Alaska noted, that chart was based on a *pre-1900* partial bottom survey. *See* Alaska Opp. to Mot. for Summ. Judg. on Count II at 31 n.16. The Master correctly found that the "clearest evidence" shows that Dry Strait is "all or mostly dry at low tide." Report at 186. *See, e.g., id.* App. H (Ex. AK-334), Exs. AK-335 to AK-341.

But to the extent the mariner's perspective matters, it plainly supports bay status here, given the river-like nature of the Archipelago's sheltered waters. In fact, mariners throughout history have had no difficulty discerning the waters' inland nature. *See* Alaska Br. 2. There is no requirement that government bureaucrats recognize a bay, or that explorers name it as such. As the United States' *own* counsel has written elsewhere, "nomenclature does not determine the status of any feature under the Convention. A bay, island, or other geographic feature will be tested against the Convention's criteria as applied by the Supreme Court, regardless of what it has been commonly called." Michael W. Reed, 3 *Shore and Sea Boundaries* 288 n.286 (2000).[19]

C. The Principles Of Article 7 Support Bay Status.

The United States argues that Alaska's juridical bay claims are inconsistent with national interests or foreign policy, U.S. Br. at 29-30, but fails to mention that the Master *rejected* such arguments below. *See* Report at 172-174, 176. Because the United States took no exceptions, these arguments are not before the Court. But in any event, the Master was correct.

The United States argues that because it could, in its discretion, apply "straight baselines" here under Article 4 of the Convention, the areas cannot be juridical bays. But as the Master noted, if an area meets the standards of Article 7, then bay status follows automatically regardless of whether

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[19] The United States does not respond to our argument on the sufficiency of South Bay's penetration. It disputes the Master's method for measuring North Bay's penetration, U.S. Br. 28 n.17, but that argument cannot be considered because the United States took no exceptions. In any event, the Master was correct. *See* Report at 207-210. Penetration is properly measured to the deepest point in the area of the bay used for the semi-circle test, even if the end-point area could be separately closed off. *See* Alaska Count II Summ. Judg. Reply at 24 n.9; Reed, *supra*, at 232 n.142. As part of North Bay under the semi-circle test, Lynn Canal's shores are an appropriate end-point for the line of penetration.

Article 4 could also be employed. *Id.* at 173-174. While the United States may decline to draw straight baselines, it may not refuse to recognize a qualifying juridical bay. *See also* Convention art. 7(6) (Article 7 does not apply "where the straight baseline system provided for in Article 4 *is applied*") (emphasis added). This Court has held that an area can qualify as historic waters even if the United States has not chosen to employ Article 4 straight baselines. *See United States* v. *Louisiana*, 394 U.S. 11, 77 n.104 (1969). Article 7 juridical bays should be treated no differently. *See also* Alaska Opp. to Mot. for Summ. Judg. on Count II at 9-14.

The Master also correctly rejected the United States' assertion that recognizing the claimed bays is contrary to foreign policy interests, noting "that the Court took sovereign interests into account when it established the criteria for assimilation" in *Maine*. Report at 176. As the Court has held, the Convention itself strikes the proper balance between domestic and international concerns. *United States* v. *California*, 381 U.S. 139, 165 (1965). Having met the terms of Article 7, the claimed bays should be recognized.

CONCLUSION

The Court should grant Alaska summary judgment on Counts I, II, and IV of the Amended Complaint, and confirm the United States' disclaimer of title on Count III.

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